89- 1484

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

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53 pp

QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong were defendants in the district court and are appellees here.

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-16a) is not yet reported.

JURISDICTION

The district court issued an order (App., *infra*, 1a-16a) dismissing one count of the criminal information on February 21, 1990. A notice of appeal to this Court (App., *infra*, 17a-18a) was filed on February 23, 1990. The jurisdiction of this Court is invoked under Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)), which provides:

> (d)(1) An appeal may be taken directly to the Supreme Court of the United States from

any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction

over any offense over which it would have jurisdiction in the absence of this section.

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), this Court held that a state statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. That decision raised concerns in the Executive and Legislative Branches over the vitality of an analogous federal provision, 18 U.S.C. 700(a) (1988).[1] As a result, Congress amended that statute with the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777. As amended effective October 28, 1989, Section 700(a)(1) makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See p. 2, *supra*.

On October 28, 1989, appellees participated in a rally outside a post office in Seattle, Washington, and burned an American flag belonging to the United States Postal Service. Appellees were charged in a

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[1] Former Section 700(a) made criminally liable:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *.

criminal information with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 1362, and one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777. The district court granted a motion to dismiss the latter flag-burning charge, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment.

A. *Texas* v. *Johnson*

The defendant in *Texas* v. *Johnson*, *supra*, burned an American flag during a political demonstration in Dallas. He was convicted in Texas state court of desecrating a venerated object, a misdemeanor offense in violation of Tex. Penal Code § 42.09(a)(3) (1989). Under that provision, an individual "commit[ted] an offense if he intentionally or knowingly desecrates * * * a state or national flag," *ibid.*; the statute defined "desecrate" to "mean[] deface, damage, or otherwise physically mistreat in any way that the actor knows will seriously offend one or more persons likely to observe or discover his action," *id.* § 42.09(b). Johnson contended before the Texas state appellate courts that the First Amendment prohibited his criminal conviction for flag burning. The Texas Court of Criminal Appeals agreed. See *Texas* v. *Johnson*, 109 S. Ct. at 2536-2537.

On June 21, 1989, this Court affirmed that ruling by a sharply divided vote, holding that the Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. *Texas* v. *Johnson*, 109 S. Ct.

at 2536-2548 (Brennan, J., joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.); *id.* at 2548 (Kennedy, J., concurring); *id.* at 2548-2555 (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting); *id.* at 2555-2557 (Stevens, J., dissenting).

At the outset, the Court outlined the pertinent analysis:

> We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien*, [391 U.S. 367, 377 (1968)], for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

109 St. Ct. at 2538 (citations omitted). The Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment," *id.* at 2540 (internal quotation marks and citation omitted); the Court thus turned to consider the interests advanced by the State of Texas to support its prohibition against flag burning.

The State first asserted an interest in preventing breaches of the peace. The Court found, however, that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning," 109 S. Ct. at 2541, and

thus concluded that the "State's position * * * amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace * * *," *ibid.* The Court rejected that sort of categorical presumption and held that, on the record presented, "the State's interest in maintaining order is not implicated." *Id.* at 2542.

Turning to the State's other asserted interest, "preserving the flag as a symbol of nationhood and national unity," 109 S. Ct. at 2542, the Court first concluded that that interest "is related to expression in the case of Johnson's burning of the flag," *ibid.* (citing *Spence* v. *Washington*, 418 U.S. 405 (1974)). The Court noted that the State appeared to be concerned "that such conduct will lead people to believe * * * that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts * * *." 109 S. Ct. at 2542. Since those "concerns blossom only when a person's treatment of the flag communicates some message," the Court determined that the State's interest was related "to the suppression of free expression." *Ibid.* And the Court specifically found that Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Id.* at 2543. Consequently, the less stringent standard of *O'Brien* was inapplicable. Instead, the Court subjected the State's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" 109 S. Ct. at 2543 (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988)).[2]

[2] The Court noted that the record contained no suggestion that the defendant had stolen the flag he burned. As a result, the Court made clear that "nothing in [its] opinion should be taken to suggest that one is free to steal a flag so long as one uses it to communicate an idea." *Texas* v. *Johnson*, 109 S. Ct. at 2544 n.8.

The Court concluded that that interest could not overcome "a bedrock principle underlying the First Amendment," namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. The Court rejected the proposition that "a State may foster its own view of the flag by prohibiting expressive conduct related to it," *id.* at 2545, stating that it has "never before * * * held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents," *id.* at 2546. And the Court refused to accord the flag any special constitutional protection, finding that there is "no indication—either in the text of the Constitution or in our cases interpreting it—that a special juridical category exists for the American flag alone." *Ibid.*

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented. 109 S. Ct. at 2548-2555. "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way * * * Johnson did here." *Id.* at 2548. The Chief Justice pointed out that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 2552. Accordingly, he could not agree that "the First Amendment invalidates the Act of Congess, and the laws of 48 of the 50 States, which make criminal the public burning of the flag." *Ibid.*

Analogizing Johnson's flag burning to the "fighting words" denied First Amendment protection in decisions such as *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the Chief Justice stated that "it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace," 109 S. Ct. at 2553. And he emphasized that the Texas statute "deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." In other words, "in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey." *Id.* at 2554.

Justice Stevens also dissented. 109 S. Ct. at 2555-2557. Given the "unique value" of the flag as a national symbol, Justice Stevens concluded that the government's interest in preserving that symbol certainly "supports a prohibition on the desecration of the American flag." *Id.* at 2557.

B. The Flag Protection Act of 1989

1. The Court's decision in *Texas* v. *Johnson*, *supra*, immediately raised concerns in the Executive and Legislative Branches over the vitality of 18 U.S.C. 700(a) (1988), the federal prohibition against desecration of the American flag. See note 1, *supra*. In *Johnson*'s wake, Congress moved with considerable dispatch to protect the integrity of the American flag. See, *e.g.*, 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (statement of Sen. Biden). By mid-July 1989,

a number of different proposals either to amend the federal statute or amend the Constitution had been introduced in both the Senate and the House of Representatives. See, *e.g.*, S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2-3 (1989).

During the summer of 1989, the Judiciary Committees of both the House and Senate held extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. See *Statutory and Constitutional Responses to the Supreme Court Decision in* Texas *v.* Johnson: *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*Senate Hearings*]. Committee members heard widely divergent testimony from a variety of sources, including Members of Congress, concerned citizens, representatives of veterans' organizations, constitutional law scholars, prominent jurists and attorneys, and representatives from the Department of Justice.[3] As a result of these

[3] William Barr, Assistant Attorney General, Office of Legal Counsel, presented testimony on behalf of the Department of Justice. He explained the Department's position at length before both the House and Senate Judiciary Committees "that, in light of the expansive decision of the Court [in *Texas* v. *Johnson*], a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment." *House Hearings* 173; *Senate Hearings* 71; see *House Hearings* 166-199; *Senate Hearings* 64-99, 115-117. Attorney General Thornburgh reiterated that position in a letter submitted to the Senate Judiciary Committee. See *Senate Hearings* 118-119.

hearings, each Committee reported out a bill to amend the current federal statute in light of *Texas* v. *Johnson*. The Committees chose not to propose constitutional amendments to overturn that decision.

2. The Senate bill, S. 1338, 101st Cong., 1st Sess. (1989), would have amended 18 U.S.C. 700(a) by deleting the element of "casts contempt upon" the flag, and instead would have made criminally liable "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States * * *." S. Rep. No. 152, *supra*, at 16. The Committee Report explained that the Senate bill's purpose

> is to protect the physical integrity of the American flag * * *. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. * * *
>
> * * * *
>
> The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 2-3.

Furthermore, the report reflected the Committee's concerted effort to draft a bill consistent with the holding in *Texas* v. *Johnson*:

> [U]nlike the law struck down in *Texas* v. *Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas* v. *Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas* v. *Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, *supra*, at 10. The Committee recognized that its bill would face a constitutional challenge, but after weighing all the competing arguments, ultimately concluded that the bill "would pass constitutional muster." S. Rep. No. 152, *supra*, at 15.

The House bill, H.R. 2978, 101st Cong., 1st Sess. (1989)—which, with minor changes, became the Flag Protection Act of 1989—expanded on the proposed Senate bill by including a new definition of "flag of the United States," an exception for disposing of a worn or soiled flag, and a provision for expedited judicial review. See H.R. Rep. No. 231, *supra*, at 1-2, 13-14; pp. 2-3, *supra*.[4] The Committee Report explained that the bill's purpose "is to protect the physical integrity of American flags." H.R. Rep. No. 231, *supra*, at 2.[5] The Committee Report made clear that the bill, like its counterpart in the Senate, was care-

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[4] Unlike its Senate counterpart, the House bill originally limited proscribed acts to "mutilates, defaces, burns, or tramples." See H.R. Rep. No. 231, *supra*, at 13. The House later accepted the Senate amendments and expanded the list of proscribed acts to include "physically defile[]" and "maintain[] on the floor or ground." See note 6, *infra*.

[5] For that reason, the bill included an exception for disposal of a worn or soiled flag. As the Committee Report explained, "[w]hen a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies." H.R. Rep. No. 231, *supra*, at 9. The bill also narrowed the definition of a "flag of the United States" to avoid "infirmities of vagueness or overbreadth." H.R. Rep. No. 231, *supra*, at 12.

fully considered and drafted in light of *Texas* v. *Johnson*:

> The bill responds to [that] decision * * * by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, *supra*, at 2.

The Committee was aware that the bill would likely face constitutional challenges, and thus sought to minimize "the delay and uncertainty that might result from extended litigation to determine the constitutionality of the statute." H.R. Rep. No. 231, *supra*, at 10. Accordingly, the bill included an express provision for expedited review "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the Committee explained, "[e]xpedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

3. On September 12, 1989, after a floor debate, the House of Representatives overwhelmingly passed H.R. 2978, as reported out of committee, by a vote of 380 to 38. See 135 Cong. Rec. H5500-H5514, H5562 (daily ed. Sept. 12, 1989). As a result, the Senate proceeded to consider that bill, as opposed to S. 1338. See 135 Cong. Rec. S12,571 (daily ed. Oct. 4, 1989).

And on October 5, the Senate, after adding two proscribed acts to the bill,[6] overwhelmingly passed H.R. 2978, by a vote of 91 to 9. See 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989). The amended bill was therefore returned to the House, where, on October 12, it was passed by a wide margin (371 to 43). See 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989). The President allowed the bill to become law without his signature on October 28, 1989.[7]

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[6] The Senate added to H.R. 2978, as passed by the House, the proscribed acts of "physically defile[]" and "maintain[] on the floor or ground." See 135 Cong. Rec. S12,616-S12,619 (daily ed. Oct. 4, 1989); *id.* at S12,654-S12,655 (daily ed. Oct. 5, 1989).

[7] In his formal statement to Congress, the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989). Nevertheless, he stated his "serious doubts that [the legislation] can withstand Supreme Court review," and made clear his position "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." *Ibid.*

Despite the Executive Branch's stated position that a constitutional amendment was necessary to ensure that the flag would be protected in the wake of *Texas* v. *Johnson* (see note 3, *supra*), Congress chose to enact the statute. As the Court noted in *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981), "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. * * * The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. And it is our position in this Court that the Court should affirm the constitutionality of the Flag Pro-

C. Criminal Charges

1. On October 28, 1989, appellees, Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong, participated in a rally outside a post office in Seattle, Washington.[8] That rally, scheduled to begin precisely when the Flag Protection Act of 1989 became effective, was advertised as a "Festival of Definance." App., *infra*, 5a n.3. As stated in a leaflet publicizing the event:

> On October 28th it becomes illegal to desecrate the flag. This fascist law is not an "exception" to the concept of free speech but an attack on political protest and dissent, and a precedent for the future. Blind patriotism must not be the law of the land. Unlike the flag-kissers, we will not whine, we will Rock and Roll in a Festival of Defiance.

App., *infra*, 5a-6a n.3. During that rally, an American flag belonging to the United States Postal Service was taken down from the flagpole outside the post office. Appellees then set that flag on fire and raised it back up the flagpole, where it became almost completely charred. App., *infra*, 2a; see Affidavit of Steven Dean and Stan Pilkey 1-6 (Nov. 28, 1989), attached to Information, *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. filed Nov. 28, 1989).

2. On November 28, 1989, the United States Attorney for the Western District of Washington filed

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tection Act because of Congress's determination regarding the weight of the governmental interest at stake and because the proscribed conduct should not fall within the protection of the First Amendment.

[8] Since the district court granted appellees' pretrial motion to dismiss the flag-burning charge, the pertinent facts are not disputed. See App., *infra*, 2a.

a criminal information charging appellees with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 1362, and one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989.

On January 18, 1990, appellees filed a joint motion to dismiss the flag-burning charge.[9] Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of review mandated by *Texas* v. *Johnson*, and therefore violated the First Amendment.[10]

D. The District Court Decision

On February 21, 1990, the district court granted the motion to dismiss the flag-burning charge, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment. App., *infra*, 1a-16a.[11] As a threshold matter, the

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[9] Appellees also filed a motion to dismiss the entire information because of prosecutorial misconduct. App., *infra*, 2a n.1. That motion remains pending before the district court.

[10] The United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

[11] For that reason, the district court did not address appellees' claim that the statute was unconstitutional on its face. App., *infra*, 2a, 15a.

The district court, once notified of the government's intention to take an interlocutory appeal to this Court, rescinded its order scheduling the trial for February 26, pending final disposition of that appeal. Order, *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990).

court concluded that appellees' "flagburning was unquestionably expressive conduct intended to convey a political message and thus implicates the First Amendment." App., *infra*, 5a.

Turning to the applicable standard of review, the district court determined that, under *Texas* v. *Johnson*, courts must apply strict scrutiny. Here, like the State's purpose in outlawing flag desecration in *Texas* v. *Johnson*, "the government's reason for enacting the Flag Protection Act of 1989 was exactly the same, *i.e.*, singling out the flag for protection as a political symbol." App., *infra*, 10a. The court therefore concluded that "it must follow that the Act too is directly related to the suppression of expression in [this] case * * * and cannot be considered content-neutral." App., *infra*, 10a.[12]

The Senate, as amicus curiae, contended that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress was "pursuing the *affirmative* objective of preserving the flag as the embodiment of diverse views and not simply advancing its own view of the flag." App., *infra*, 10a. The district court rejected that argument as "without merit," explaining that "[c]ommon sense dictates that pursuing the affirmative goal of preserving the flag because it represents a nation of diverse views inevitably results in suppressing the views of those who would express their opinion by destroying the flag." App., *infra*, 10a-11a. In the court's view, "[w]hether the governmental interest is stated in affirmative terms or not,

[12] The United States agreed with appellees that, under *Texas* v. *Johnson*, the Flag Protection Act was subject to strict scrutiny, as opposed to the more lenient *O'Brien* standard of review. App., *infra*, 8a.

the fact remains that Congress is outlawing certain forms of expressive conduct under the Flag Protection Act." App., *infra*, 11a.[13]

The House of Representatives, as amicus curiae, took a different tack, contending that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress "wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value." App., *infra*, 12a. The district court dismissed that argument on two grounds: first, "the legislative history contains not one mention of the sovereignty interest as a reason for enacting the legislation," App., *infra*, 12a, and second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty, *i.e.*, expressive conduct," App., *infra*, 12a-13a.

Applying the stringent standard of review to the Flag Protection Act, the district court concluded that "the asserted governmental interest in protecting the symbolic value of the flag cannot survive [that] exacting scrutiny * * *." App., *infra*, 14a. The court observed that in *Texas* v. *Johnson*, this Court stated

[13] The district court rejected as constitutionally irrelevant the fact that the Flag Protection Act "leaves open ample alternative channels for communication in that it does not prohibit protest against governmental policies in other ways." App., *infra*, 11a n.6 (citing *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974)).

The district court also declined to uphold the Flag Protection Act on the ground that the statute was "aimed at protecting the physical integrity of the flag in all circumstances," since the Act failed to do so. App., *infra*, 11a n.6.

that "nothing in [the Court's] precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it," App., *infra*, 14a (quoting *Texas* v. *Johnson*, 109 S. Ct. at 2545). And the court decided that *Texas* v. *Johnson* foreclosed the government's claim that Congress, on behalf of the Nation, has "a sufficiently compelling interest in preserving the flag as a political symbol to survive strict scrutiny." App., *infra*, 14a.

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), a sharply divided Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. In so holding, the Court stressed one infirmity of that state law provision—the law "reache[d] only those severe acts of physical abuse of the flag carried out in a way likely to be offensive," *id.* at 2543, and emphasized the narrowness of the question it was deciding. See *id.* at 2544 n.8 ("Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted.") By contrast, this case involves a federal statute—based on Congress's determination that the American flag is a unique national symbol deserving special protection—that prohibits persons from physically destroying that symbol, without reference to immediate audience reaction. In these respects, the case presents a question not squarely controlled by *Texas* v. *Johnson*. The question, which involves the constitutionality of a carefully drafted federal statute enacted by overwhelming votes of Congress, is substantial and should be set for plenary consideration by this Court.

1. The substantial nature of the constitutional question presented is made plain by Congress's express provision for expedited direct review in this Court. Flag Protection Act of 1989, Pub. L. No. 101-131, § 3, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)); p. 3, *supra*. Section 700(d)(1), as amended, specifically provides that

> [a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of [Section 700](a).

Congress further stressed the significance of resolving the statute's constitutionality by providing for *mandatory, expedited* appellate review in this Court over a ruling on that issue appealed to the Court:

> The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

18 U.S.C. 700(d)(2) (as amended).

Congress was well aware that the Flag Protection Act would likely be challenged, and thus sought to minimize "the delay and uncertainty that might result from extended litigation * * *." H.R. Rep. No. 231, *supra*, at 10. Congress thus included these special jurisdictional provisions "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the House Judiciary Committee explained, "[e]xpedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such

review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

In this case, a constitutional challenge to the Flag Protection Act, the district court has struck down that statute as unconstitutional as applied to appellees' burning of a flag of the United States.[14] The Court "has not previously ruled [up]on [that] question," 18 U.S.C. 700(d)(2) (as amended), and thus this case falls squarely within the Court's mandatory appellate jurisdiction created by the Flag Protection Act and merits the expedited review expressly provided by that statute.

2. The United States does not dispute that appellees' flag burning constitutes expressive conduct. See, *e.g.*, *Texas* v. *Johnson*, 109 S. Ct. at 2539-2540; *Spence* v. *Washington*, 418 U.S. 405, 409-410 (1974). Nor does the United States dispute that Congress enacted the Flag Protection Act in order to prohibit that narrow category of "symbolic speech" —that is precisely the purpose of this criminal provision. See App., *infra*, 9a-14a; pp. 8-13, *supra*. Nevertheless, those propositions should not doom the Act's constitutionality. In this case, the district court overvalued, for purposes of the First Amendment, the narrow category of expressive conduct at stake, and undervalued the compelling governmental interest—expressly identified by both the Congress

[14] On March 5, 1990, the United States District Court for the District of Columbia held that the Flag Protection Act, as applied to prosecutions for burning an American flag, violated the First Amendment. *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. Mar. 5, 1990). The United States filed a notice of appeal to this Court on March 6, 1990. The United States is today filing its jurisdictional statement in that case, requesting that the Court consider both cases simultaneously.

and the President—that lies at the core of the statute: the preservation of the flag as the unique symbol of our Nation. When reviewed from the proper constitutional perspective, the Flag Protection Act fits within the bounds of the First Amendment.[15]

[15] In this prosecution, appellees are charged with burning a flag of the United States that belonged to the United States Postal Service. App., *infra*, 2a. In *Texas* v. *Johnson*, the Court expressly left open the question whether an individual may be prosecuted for burning a flag after he had stolen it. 109 S. Ct. at 2544 n.8; see *id.* at 2557 (Stevens, J., dissenting); see also note 2, *supra*. In our view, the Flag Protection Act, as applied to appellees' *particular* conduct, *i.e.*, burning an American flag that is property of the United States, is constitutional. Indeed, in *Spence* v. *Washington*, 418 U.S. 405, 409 (1974), the Court stated that "[w]e have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property."

Nevertheless, the statute, as drafted by Congress, is not "subject to such a limiting construction," *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982), and we do not urge the Court to resolve this case on that ground. As the district court apparently concluded, the statute is still susceptible to a substantial overbreadth challenge under the First Amendment, and thus this Court must consider the statute's application to the destruction of flags that do not happen to be federal property. See *New York* v. *Ferber*, 458 U.S. at 766-773; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-615 (1973); cf. *Massachusetts* v. *Oakes*, 109 S. Ct. 2633, 2637 (1989) (plurality opinion); *id.* at 2640-2641 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 2642 (Brennan, J., dissenting).

As noted (see note 14, *supra*), the United States is today filing its jurisdictional statement in *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. Mar. 5, 1990), and is requesting that the Court consider both cases simultaneously. *Eichman*, unlike the instant case, involves a prosecution for burning flags of the United States that were not federal property.

a. In a line of established precedent, the Court has "laid the foundation for the excision of [certain speech] from the realm of constitutionally protected expression." *New York* v. *Ferber*, 458 U.S. 747, 754 (1982). As summarized by the Court over a generation ago:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. *New Hampshire*, 315 U.S. 568, 571-572 (1942) (footnotes omitted); see, *e.g.*, *New York* v. *Ferber*, *supra* (child pornography); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Roth* v. *United States*, 354 U.S. 476 (1957) (obscenity). Those categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. at 572. In other words,

> it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

New York v. *Ferber*, 458 U.S. at 763-764; see *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

The Court has consistently recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California*, 413 U.S. 15, 23 (1973). Nevertheless, as an acknowledgment of shared values that are part of the Nation's heritage, the Court has refused to accord certain narrow, well-defined types of speech full First Amendment protection. As *Chaplinsky* and *Ferber* suggest, the protections of the First Amendment do not apply where (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or for particular overarching social policies, see, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) (false and misleading commercial speech); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) (employer's anti-union statements before representation election), and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message, cf. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (restrictions on exhibition of "adult films").[16]

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[16] To be sure, in both *Texas* v. *Johnson*, 109 S. Ct. at 2546 n.11, and *Spence* v. *Washington*, 418 U.S. at 411 n.4, the Court eschewed such a consideration of alternative means of expression, in the context of holding that the First Amendment protected symbolic speech involving the American flag. Those decisions, however, assumed that such expressive conduct merited full First Amendment protection. This case presents the Court with the opportunity to reconsider that premise,

b. That constraining principle of the First Amendment applies to the conduct at issue—appellees' burning of a flag of the United States. Congress, which by design takes into account the interests of all citizens, see The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961), and the President, who is "elected by all the people," *Myers* v. *United States*, 272 U.S. 52, 123 (1926), have now spoken with one voice—the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems.

As the Senate Judiciary Committee explained:

> The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3. The House Judiciary Committee echoed those findings:

> [The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object * * *.

H.R. Rep. No. 231, *supra*, at 9. And the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest sym-

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particularly where, as here, the people's elected representatives—the Congress and the President—have made the considered decision that the physical destruction of the flag is—uniquely—anathema to the Nation's values.

bol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989).

In *Spence* v. *Washington*, 418 U.S. at 413, the Court eloquently foreshadowed the motivating force behind the Flag ~~Preservation~~ Protection Act:

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

And that representative consensus identifies the substantial potential harm posed by wanton physical destruction of the American flag—the weakening of the shared values that bind our national community.[17] As Justice Stevens remarked:

> [S]anctioning the public desecration of the flag will tarnish its value—both to those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.

Texas v. *Johnson*, 109 S. Ct. at 2556 (dissenting opinion).

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not mer-

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[17] Indeed, Congress originally enacted the predecessor statute in 1968 based on its finding that "[p]ublic burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation." S. Rep. No. 1287, 90th Cong., 1st Sess. [*sic*; 2d] 3 (1968).

ited full protection under the First Amendment. Flag burning, like "fighting words," obscene materials, and defamatory statements,[18] presents substantial "evils" incompatible with "the very purpose for which organized governments are instituted," *Texas* v. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). And, such conduct (at most) involves "expressive interests" which, given the availability of other means of expression, are "overwhelmingly outweigh[ed]" by the identified harm. *New York* v. *Ferber*, 458 U.S. at 763-764. Considered within this analytical framework, the Flag Protection Act, contrary to the district court's reasoning, is consistent with the First Amendment.

c. Although the act of burning an American flag, in our view, falls outside the scope of protected speech under the First Amendment, a governmental prohibition against such conduct must still withstand judicial scrutiny. As both this case, see App., *infra*, 2a, 5a & n.3, and *Texas* v. *Johnson*, 109 S. Ct. at 2536-2540, vividly show, the proscribed conduct will likely be accompanied by otherwise fully protected expression. For that reason, a governmental measure designed to outlaw destruction of an American flag must be limited to achieve that particular objective and should be scrutinized to ensure that it does not unnecessarily proscribe otherwise protected

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[18] Such statements fit literally within the text of the First Amendment, yet they have been deemed unworthy of protection and thus not to constitute "speech" for purposes of First Amendment analysis. That is so even though such expressions may reflect the most deeply held views on subjects of interest to the polity (and thus lying at the core of those values protected by the First Amendment).

expression under the First Amendment. See, *e.g.*, *Street* v. *New York*, 394 U.S. 576 (1969). The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—ensures that only such unprotected expression will be prosecuted.

d. Finally, we recognize that our submission here is in tension with the Court's recent decision in *Texas* v. *Johnson*, *supra*. Nevertheless, the Court there had no occasion to address, much less weigh for constitutional purposes, the sort of express *Congressional* determination regarding the need to protect the integrity of the American flag that led to the enactment of the Flag Protection Act at issue in this case. And to the extent that the *Johnson* Court accorded flag burning, as expressive conduct, full First Amendment protections, the United States respectfully suggests that this case—together with *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. Mar. 5, 1990) (see note 14, *supra*)—present an appropriate occasion for the Court to consider more fully that analysis.

3. As noted, the Flag Protection Act specifies that an appeal to this Court may be taken "from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality" of the Act, 18 U.S.C. 700(d)(1) (as amended), and that "[t]he Supreme Court shall * * * accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible," 18 U.S.C. 700(d)(2) (as amended). In view of those express Congressional directives, the United States has endeavored to expedite the matter thus far, and we stand ready to adhere to an expedited

briefing schedule. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).[19]

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited, simultaneously with the appeal filed in *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. Mar. 5, 1990).

Respectfully submitted.

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MARCH 1990

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[19] In *Dames & Moore*, the Court granted certiorari before judgment on June 11, 1981, and ordered the parties to exchange and file opening briefs by June 19, 1981, and any reply briefs by June 23, 1981. The case was argued on June 24, 1981, and decided by July 2, 1981. This occurred in a case in which Congress had not even mandated expedited review, let alone expedited review "to the greatest extent possible."

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Feb. 21, 1990]

MEMORANDUM DECISION DISMISSING COUNT II OF THE INFORMATION BASED ON UNCONSTITUTIONALITY OF FLAG PROTECTION ACT

THIS MATTER comes before the court on a joint motion by defendants Mark Haggerty, Jennifer Campbell, Darius Strong and Carlos Garza to dismiss Count II of the information against them. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. *FACTUAL BACKGROUND*

For purposes of this motion, the facts are undisputed.[1] Early on the morning of October 28, 1989, defendants burned a United States flag belonging to the United States Postal Service. The flagburning occurred during a political demonstration convened in front of a post office in Seattle, Washington to protest the enactment of the Flag Protection Act of 1989, 18 U.S.C. § 700. That statute, which prohibits flagburning, had taken effect only minutes before defendants' actions against the flag.

Defendants were charged with committing two misdemeanors: one count of wilful injury to federal property contrary to 18 U.S.C. §§ 1361 and 1362, and one count of knowingly burning a United States flag in violation of the Flag Protection Act. Defendants now move to dismiss the flagburning charge on the grounds that the statute forbidding that activity is unconstitutional under the First Amendment to the United States Constitution both on its face and as applied to their conduct. The court will consider the latter argument first.

II. *LEGAL ARGUMENT*

The Flag Protection Act of 1989 provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." 18 U.S.C. § 700(a)(1).

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[1] Defendants have reserved the right to a jury trial if the instant motion is not granted. They have also moved to dismiss the information on grounds of outrageous government conduct.

However, the statute "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. § 700(a)(2). A "flag of the United States" is defined as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. § 700(b).

Defendants contend that, as applied to their flagburning activities, the Act is unconstitutional because it prohibits expressive conduct which is protected by the First Amendment. Defendants insist that this result is required pursuant to a very recent decision, *Texas v. Johnson*, 109 S.Ct. 2533 (1989), in which the United States Supreme Court struck down as unconstitutional a Texas statute forbidding the desecration of venerated objects including the United States flag.

Texas v. Johnson involved the criminal prosecution of Gregory Johnson for burning a United States flag on the steps of City Hall in Dallas, Texas during the 1984 Republican National Convention. The flagburning was the culmination of a demonstration protesting Reagan administration policies. Johnson was charged with violating a Texas law banning people from "defac[ing], damag[ing] or otherwise physically mistreat[ing] [a United States flag] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

Johnson argued and the United States Supreme Court concluded that the Texas statute unconstitutionally infringed on expressive conduct protected under the First Amendment as applied to Johnson's flagburning. Defendants in the instant case contend that the same result must follow here.

The government acknowledges the relevance of the *Johnson* decision, but its response is curiously split. The court has received three briefs in opposition to defendants' motion: one from the Department of Justice, which reflects the position of the executive branch; and two briefs from Congress, one from the United States House of Representatives and one from the United States Senate, which set forth the somewhat divergent views of the legislative branch.[2] While all three briefs argue that the Flag Protection Act is distinguishable from the law reviewed in *Johnson* and thus constitutional, they reach that end by differing and even conflicting means. This court will accordingly review the arguments in each brief separately.

A. *Expressive Conduct*

The threshold question addressed by the *Johnson* Court in its analysis of the constitutionality of the Texas law as applied to Johnson's conduct was whether his burning of the flag constituted expressive conduct arguably protected by the First Amendment. 109 S.Ct. at 2538-40.

Although the First Amendment literally protects only freedom of "speech," the Supreme Court has long recognized that "expressive conduct," *i.e.*, conduct through which the actor intends to convey an idea, also falls within its ambit. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (display of a red flag in opposition to the government); *Brown v. Louisiana*, 383 U.S. 131 (1966) (silent sit-in demonstration by blacks to protest segregation in a library); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students' wearing of black armbands to protest American military involvement in Vietnam); *Spence v. Washington*, 418 U.S. 405 (1974) (attaching a peace sign to the flag). In all of these cases, the Supreme Court found that the conduct in question possessed sufficient communicative elements to implicate the First Amendment.

[2] The United States Senate and House of Representatives appear in this case as amici curiae.

Based on this well-established precedent, the Court had no difficulty in finding that Johnson could invoke the First Amendment. His act of burning the flag was part of a political demonstration protesting the renomination of Ronald Reagan as the Republican presidential candidate. As such, the Court concluded that the conduct was clearly intended to communicate a political message and that the message was apparent to the audience. *Johnson*, 109 S.Ct. at 2540.

Likewise, this court must determine if defendants' flagburning in this case was "'sufficiently imbued with elements of communication . . .' to implicate the First Amendment." *Id.* at 2539 (quoting *Spence*, *supra*, 418 U.S. at 409). No one disputes that their conduct took place during a political demonstration protesting the newly effective Flag Protection Act. Like the *Johnson* Court, this court readily concludes that "[t]he expressive, overtly political nature of [defendants'] conduct was both intentional and overwhelmingly apparent." 109 S.Ct. at 2540. Defendants' flagburning was unquestionably expressive conduct intended to convey a political message and thus implicates the First Amendment.[3]

[3] A leaflet publicizing the demonstration urged people to participate in a "Festival of Defiance":

> On October 28th it becomes illegal to desecrate the flag. This fascist law is not an "exception" to the concept of

B. *Governmental Interest*

1. *Applicable Standard*

If, as this court has found, defendants' conduct was expressive, the next step in the *Johnson* analysis is to determine whether the government's interest in regulating that conduct is related to the suppression of free expression. *Id.* at 2538. If it is not, the government need only justify defendants' prosecution under the less stringent standard set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), for regulation of noncommunicative conduct. That standard requires the government to establish an important or substantial interest in regulating the nonexpressive element of the conduct.

If, on the other hand, the government's interest is related to the suppression of free expression, a more demanding standard is applicable. *Johnson*, 109 S.Ct. at 2538; *Spence*, 418 U.S. at 409-11. Under those circumstances, the court must subject the government's asserted interest to "the most exacting scrutiny." *Johnson*, 109 S.Ct. at 2543 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). In order to survive this strict scrutiny, the government must establish a compelling interest justifying the regulation of expressive conduct. *Boos* at 321.

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free speech but an attack on political protest and dissent, and a precedent for the future. Blind patriotism must not be the law of the land. Unlike the flag-kissers, we will not whine, we will Rock and Roll in a Festival of Defiance.

Attachment to Exhibit 2, Affidavit of Jennifer Proctor Campbell in support of defendants' motions to dismiss the charges against them.

2. *Government Interest in Texas v. Johnson*

In *Johnson*, the State of Texas asserted an interest in prohibiting flag desecration to preserve the flag as a symbol of nationhood and national unity.[4] The Supreme Court held that this interest in protecting the symbolism of the flag was inextricably tied to the suppression of free expression. In reaching this conclusion, the Court harked back to its decision in *Spence*, 418 U.S. at 414, n.8, where it "acknowledged that the Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity' such as affixing a peace symbol to a flag." *Johnson*, 109 S.Ct. at 2542. The *Johnson* court continued:

> We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message. . . .

Id. Because the State's interest was related to the suppression of free expression, the Court concluded that the more lenient standard of review set forth in *O'Brien* was not pertinent.

Defendants in this case argue that the same reasoning and result apply here. Defendants assert that, although the superficial rationale for the legislation

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[4] A second interest asserted by the State, preventing breaches of the peace, is not relevant here.

at issue is to protect the physical integrity of the flag, the only underlying governmental interest is the protection of the flag as a political symbol, and that this interest is, by definition, related to the suppression of expression because the government's interest in the flag as a symbol can only be threatened by an act communicating a message which undermines the flag's symbolic value. In other words, the danger against which the government wishes to protect the flag only arises from the communicative element of the prohibited conduct. Because the governmental interest underlying the Flag Protection Act is directly related to the suppression of expression, defendants argue that this court, like the Court in *Johnson*, must apply a standard of strict scrutiny in assessing the constitutionality of the legislation.

3. *Department of Justice Position*

The Department of Justice agrees with defendants that the Court's ruling in *Johnson* controls this court's decision on the applicable standard. Pursuant to *Johnson*, the Department of Justice concedes that the government's only conceivable interest in protecting the physical integrity of the flag is to promote its value as a political symbol, that this interest is inherently related to the suppression of free expression and that, therefore, legislation prohibiting flagburning, including the law at issue here, is subject to strict scrutiny.[5]

[5] The Department of Justice's position before this court echoes the testimony of the Department's representative during congressional hearings. In that testimony, William P. Barr, Assistant Attorney General for the Office of Legal Counsel, maintained that given the expansive nature of the Supreme Court's ruling in *Johnson* on the standard applicable

4. *United States Senate Position*

The United States Senate agrees that the underlying purpose of the Flag Protection Act of 1989 is to protect the flag as a political symbol. But the Senate insists that *Johnson* is not dispositive of which standard of scrutiny to apply in this case because of significant differences between the Texas statute and the legislation at issue here.

As the Senate points out, a necessary element of an offense under the Texas law was knowledge that the conduct in question would "seriously offend one or more persons likely to observe or discover [the] action." The Texas law was, therefore, undeniably content-based. The existence of a violation depended entirely on the content and the probable communicative impact of the conduct. *Johnson*, 109 S.Ct. at 2543.

The Senate argues that the Flag Protection Act of 1989 is, by contrast, content-neutral in that it protects the physical integrity of the flag by proscribing certain destructive conduct regardless of the actor's intent to convey a message or the communicative impact on the audience. Based on its contention that the Act is content-neutral, the Senate reasons that the Act is not related to the suppression of expression and is accordingly reviewable under the more lenient *O'Brien* standard of scrutiny.

Unfortunately, the Senate's definition of what constitutes content-neutrality is incorrect, thus dooming its entire argument. The United States Supreme Court recently addressed this question in *Boos v. Barry*, 485 U.S. 312 (1988). The Court stated that content-neutral restrictions on speech are "those that

to a flagburning law, Congress could not possibly draft a flag protection statute that would evade strict scrutiny.

'are *justified* without reference to the content of the regulated speech.'" *Id.* at 320 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added)). Thus, it is the *reason* for the legislation and not its *scope* which determines content-neutrality. If the justification for protecting the flag is related to the suppression of expression, it is not content-neutral even though the Act on its face is applicable to anyone who engages in certain conduct regardless of the actor's intent or the impact of the conduct.

Johnson succinctly addresses this point in the context of flag-burning legislation. As this court explained earlier, *Johnson* held that the governmental interest in preserving the flag's symbolic value under the Texas law was directly related to the suppression of free expression in the case of Johnson's burning of the flag. Since the Senate admits that the government's reason for enacting the Flag Protection Act of 1989 was exactly the same, *i.e.*, singling out the flag for protection as a political symbol, it must follow that the Act too is directly related to the suppression of expression in the case of the defendants before this court and cannot be considered content-neutral. Therefore, the less stringent *O'Brien* standard is inapplicable.

The Senate also argues that the interest which the government seeks to advance by protecting the flag from harm under the legislation at issue is not related to the *suppression* of expression. Instead, the Senate contends, Congress is pursuing the *affirmative* objective of preserving the flag as the embodiment of diverse views and not simply advancing its own view of the flag. This argument is without merit. Common sense dictates that pursuing the affirmative goal of

preserving the flag because it represents a nation of diverse views inevitably results in suppressing the views of those who would express their opinion by destroying the flag. The *Johnson* decision itself uses the phrases "related to expression" and "related to the suppression of expression" interchangeably. *See, e.g.*, 109 S.Ct. at 2538, 2542. Whether the governmental interest is stated in affirmative terms or not, the fact remains that Congress is outlawing certain forms of expressive conduct under the Flag Protection Act.[6]

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[6] The Senate also raises two other contentions which can be quickly dismissed. First, the Senate argues that the Flag Protection Act leaves open ample alternative channels for communication in that it does not prohibit protest against government policies in other ways, including many involving symbolic use of the flag. The argument that certain expressive conduct can be prohibited because other means of expression are available was rejected out of hand in *Spence*, 418 U.S. at 411 n.4 (1974). *See also Johnson*, 109 S.Ct. at 2546 n.11.

Second, the Senate points to the passage in *Johnson* in which the Court noted that the Texas law was not aimed at protecting the physical integrity of the flag in all circumstances. *Id.* at 2543. In a footnote, the Court then referred to Justice Blackmun's dissent in *Smith v. Goguen*, 415 U.S. 566, 590-91 (1974), in which he stated that he would have upheld defendant's conviction for sewing a flag on the seat of his pants because the lower court appeared to have construed the state statute in question so as to protect the physical integrity of the flag in all circumstances. *Johnson*, 109 S.Ct. at 2543 n.6. Based on this language, the Senate argues that the Court is prepared to uphold a statute which affords such protection to the flag.

This court need not consider what the Supreme Court would do in the face of such legislation because the Flag Protection Act does not accomplish this end. Although the Act does not focus on the actor's motive, the types of conduct proscribed

5. *United States House of Representatives Position*

Unlike the Department of Justice and the Senate, the United States House of Representatives does not agree with defendants that the government's sole interest in protecting the physical integrity of the flag arises out of its symbolic value. Instead the House argues that Congress enacted the Flag Protection Act because it wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value. It is the House's contention that flying the flag to claim sovereignty has a concrete legal purpose and that protecting the flag protects that sovereignty interest. In support of this argument, the House recounts the history of the use of the United States flag as an indicator of sovereignty, including numerous instances in which violations of the flag's physical integrity have been deemed threats to the sovereignty of this nation.

There are two serious problems with the House's argument: First, the legislative history is replete with references to the importance of protecting the flag because of the values its symbolizes. But the legislative history contains not one mention of the sovereignty interest as a reason for enacting the legislation.

Second, the use of the flag as a mean of indicating sovereignty is itself a symbolic use. The government's only possible interest in protecting the physical integ-

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are those generally associated with disrespect for the flag. Other types of conduct which also threaten the physical integrity of the flag but which do not communicate a negative or disrespectful message, like flying the flag in inclement weather or carrying it into battle, are not prohibited. Thus, the Act fails to protect the flag's physical integrity in all circumstances.

rity of the flag as an incident of sovereignty is to prevent or punish acts of disrepect amounting to a rejection of United States sovereignty, *i.e.*, expressive conduct. Thus, even if Congress does seek to prevent harm to the flag as an incident of sovereignty, that interest relates to the suppression of expression and is subject to strict scrutinty.[7]

C. *Strict Scrutiny of Government Interest*

The final step in the analysis of the constitutionality of the Flag Protection Act is to determine whether the government's interest in enacting the statute can survive the applicable strict scrutiny standard. *Johnson*, 109 S.Ct. at 2542-48.

The court begins with the observation that, as in *Johnson*, this case involves the prosecution of defendants for expressing political ideas, "expression situated at the core of our First Amendment values." *Id.* at 2543; *Boos*, 485 U.S. at 318. However, the

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[7] The case on which the House of Representatives relies in support of its argument likewise fails to differentiate between the flag as an incident of sovereignty and its role as a symbol of the nation. In *Joyce v. United States*, 454 F.2d 791, 985 (D.D.C. 1971), the court found that the power to adopt a national flag and to regulate conduct with respect to its was "an incident of sovereignty which inheres in the Government of the United States of America as a nation and which the Constitution recognizes and implements." However, the court went on to hold that the governmental interest in protecting the flag from desecration was "a reflection of the interest which the people of the United States have manifested, through their representatives, in having a symbol to represent them as a nation." *Id.* at 988.

The court also notes that the House does not explain how the governmental interest in preserving the flag as an incident of sovereignty would be harmed by flagburning.

court is also cognizant that an act of Congress carries with it a strong presumption of constitutionality. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981); *United States v. Watson*, 423 U.S. 411, 421-23 (1976).

After carefully considering the provisions of the Flag Protection Act, the court concludes that the legislation is unconstitutional as applied to the facts of this case. It is clear that, pursuant to the decision in *Johnson*, the asserted governmental interest in protecting the symbolic value of the flag cannot survive the exacting scrutiny which this court must apply. As *Johnson* bluntly stated, "nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it." *Johnson*, 109 S.Ct. at 2545.

Indeed, both the House and the Senate in effect concede this point. By arguing so strenuously that the constitutionality of the Flag Protection Act should be decided under the more lenient *O'Brien* standard, they implicitly recognize that the Act cannot survive the more stringent standard applied in *Johnson*.

The Department of Justice, however, urges the court to find that the government does have a sufficiently compelling interest in preserving the flag as a political symbol to survive strict scrutiny. Acknowledging that *Johnson* ruled to the contrary and recognizing that this court cannot overrule the United States Supreme Court, the Department of Justice nevertheless contends that this court can rely on the recent governmental affirmations of a compelling national interest in protecting the flag as evidenced by the congressional enactment of the Flag Protection Act and the presidential call for a constitutional amendment.

Again, *Johnson* precludes such a result. The Court in *Johnson* forcefully rejected the notion that the government can restrict the use of a symbol to reflect only one view of that symbol:

> To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. . . . To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

109 S.Ct. at 2546. Thus, the *Johnson* Court reaffirmed that the core purpose of the First Amendment is to protect political dissent, and that to suppress such criticism in one instance so as to protect the sensibilities of the majority does not strengthen the nation. On the contrary, it erodes the basis of our political freedom.

Moreover, the Court found no constitutional basis or legal precedent for treating the flag any differently from other concepts and symbols, and "decline[d] . . . to create for the flag an exception to the joust of principles protected by the First Amendment." *Id.*

III. *CONCLUSION*

For the above reasons, this court GRANTS defendants' motion to dismiss Count II of the information against them on the grounds that the Flag Protection Act is unconstitutional as applied to their conduct in burning a United States flag.

Although it believes that the law clearly requires this result, the court respects the strong feelings held

by many on this issue. The court is well aware of the reverence with which many people who have sacrificed much for this country regard the United States flag. But in order for the flag to endure as a symbol of freedom in this nation, we must protect with equal vigor the right to destroy it and the right to wave it. As Justice Brennan said in *Johnson*, "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." 109 S.Ct. at 2547-48.

This is an inspiring time for those of us who treasure freedom. Countries all over the world are striving to adopt democratic principles derived from our Constitution as part of their forms of government. The freedom of speech enshrined in our First Amendment is the crucial foundation without which other democratic values cannot flourish. It is a tribute to the strength of our nation and to our faith in democratic government that even a means of protest which is profoundly painful and offensive to many people is protected.

Burning the flag as an expression of political dissent, while repellent to many Americans, does not jeopardize the freedom which we hold dear. What would threaten our liberty is allowing the government to encroach on our right to political protest. It is with the firm belief that this decision strengthens what our flag stands for that this court finds the Flag Protection Act unconstitutional.

DATED at Seattle, Washington this 21st day of February, 1990.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, CARLOS GARZA, JENNIFER PROCTOR CAMPBELL, AND DARIUS ALLEN STRONG, DEFENDANTS

[Filed: Feb. 23, 1990]

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the order of this Court filed in the above-captioned matter on February 21, 1990.

This appeal is taken pursuant to Pub. L. No. 101-131, § 3, 103 Stat. 777 (1989) (to be codified at 18 U.S.C. 700(d)).

DATED this *23rd* day of *February*, 1990.

Respectfully submitted,

MIKE MCKAY
United States Attorney

/s/ Mark N. Bartlett

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